

A See Thong & Anor v Saw Beng Chong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
B-02(IM)-588-03 OF 2012

B
RAMLY ALI, ZAHARAH IBRAHIM AND ANANTHAM KASINATHER
JJCA
25 JULY 2012

C *Civil Procedure — Striking out — Application to strike out action — Appeal against — Whether High Court judge erred when she held that she would only consider application under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 as both parties had filed their respective affidavits — Whether O 18 r 19(1)(a) ought to have been considered by trial judge — Whether appellants' cause of action was obviously unsustainable — Whether appellants' claim scandalous, frivolous or vexatious and/or abuse of process of court — Rules of the High Court 1980 O 18 r 19(1)(a), (b) & (d)*

The appellants, husband and wife, were the legal owners of two properties situated in Selangor ('the properties'). The appellants entered into two sets of sale and purchase agreements for the sale of the properties to the respondent. The appellants later filed a writ and statement of claim against the respondent for return of ownership of the properties to the appellants upon the latter's payment of RM100,000 to the respondent. The appellants claimed that they had signed the two sets of sale and purchase agreements, which provided that the purchase price of the properties were RM300,000 and RM200,000 respectively, as security for a loan in the sum of RM500,000 from the respondent. The appellants further pleaded that they had repaid the loan sum and that there was only a balance of RM100,000 that remained outstanding. It was the appellant's case that the two SPAs were void and invalid on the grounds that they were executed as security for a loan transaction with the respondent, who had no licence to lend money. The respondent filed an application for the appellants' writ and statement of claim to be struck out pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980. The respondent submitted that there was an outright sale of the properties by the appellants to him and that he had legally obtained indefeasible titles to the properties from the appellants. As such, the respondent contended that the appellants' claim did not disclose any cause of action against him. After considering the affidavit evidence, the High Court judge allowed the respondent's application. This was the appellants' appeal against that decision.

Held, allowing the appeal:

- (1) An applicant for striking out under O 18 r 19 (1) could rely on any one

or more than one sub-para (a) to (d). The only limitation imposed is that no evidence is admissible for an application under sub-para (a). In the present case the respondent's striking out application was based on O 18 r 19(1)(a) to (d) and the High Court judge held that she would only consider the application under O 18 r 19(1)(b) and (d) as both parties had filed their respective affidavits. However, what the trial judge ought to have done was to have dealt with sub-para (a) first and to ignore completely the two affidavits filed by the parties, before considering the affidavit evidence and dealing with sub-para (b) and (d) (see paras 9–10).

- (2) The power to strike out a case under O 18 r 19(1)(a) is a power that ought to be very sparingly exercised and only in very exceptional cases. The trial judge had to be satisfied that the statement of claim as it stood was insufficient even if proved to entitle the appellants to the relief they had prayed for and to conclude that the cause of action was obviously unsustainable. In the present case, the statement of claim filed by the appellants against the respondent clearly disclosed some cause of action under the law of contract or had raised some questions fit to be decided. Thus, the statement of claim though not perfect was not hopeless, baseless or without any foundation in law. In the circumstances it was not appropriate for the present claim to be struck out under O 18 r 19(1)(a) (see paras 12–13).
- (3) Both sub-para (b) and (d) were based on the same principle, i.e. striking out was not appropriate when there was conflicting evidence in the affidavits. In the present case, there was clearly a conflict of evidence in the affidavits filed by both parties and the status of the transaction which led to the ownership of the two properties being transferred to the respondent was really and genuinely in dispute. In the circumstances the appellants' claim against the respondent was not scandalous, frivolous or vexatious and not an abuse of the process of the court. It was thus ordered that the case be remitted to the High Court for trial (see paras 21, 27–28).

[Bahasa Malaysia summary]

Perayu-perayu, suami dan isteri, merupakan pemilik sah dua hartanah yang terletak di Selangor ('hartanah-hartanah tersebut'). Perayu-perayu telah memeterai dua perjanjian jual beli untuk jualan hartanah-hartanah kepada responden. Perayu-perayu kemudiannya memfailkan writ dan pernyataan tuntutan terhadap responden untuk memulangkan milikan terhadap hartanah-hartanah kepada perayu-perayu setelah perayu-perayu membayar RM100,000 kepada responden. Perayu-perayu mendakwa bahawa mereka telah menandatangani dua perjanjian jual beli, yang mana memperuntukkan bahawa harga belian hartanah adalah masing-masing sebanyak RM300,000 dan RM200,000, sebagai jaminan untuk pinjaman berjumlah RM500,000 daripada responden. Perayu-perayu selanjutnya memplid bahawa mereka telah

- A membayar semula amaun pinjaman dan bahawa hanya baki sebanyak RM100,000 yang masih tertunggak. Adalah kes perayu-perayu bahawa kedua-dua perjanjian jual beli adalah terbatal dan tidak sah atas dasar bahawa ianya telah ditandatangani sebagai jaminan untuk transaksi pinjaman dengan responden, yang tidak memiliki lesen untuk membuat pinjaman. Responden
- B telah memfailkan permohonan supaya writ dan pernyataan tuntutan perayu-perayu untuk dibatalkan menurut A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980. Responden berhujah bahawa terdapat jualan hartanah-hartanah secara terang-terangan oleh perayu-perayu kepadanya dan bahawa dia dengan sah telah memperoleh hak milik tidak boleh
- C disangkal terhadap hartanah-hartanah daripada perayu-perayu. Oleh yang demikian, responden berhujah bahawa tuntutan perayu-perayu tidak mengemukakan apa-apa kausa tindakan terhadapnya. Selepas mempertimbangkan affidavit keterangan, hakim Mahkamah Tinggi membenarkan permohonan responden. Ini merupakan rayuan perayu-perayu
- D terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan:

- (1) Seorang pemohon untuk pembatalan menurut A 18 k 19(1) boleh bersandarkan kepada salah satu atau lebih daripada sub-perenggan (a) hingga (d). Satu-satunya pembatasan ialah tidak terdapat keterangan yang boleh diterima untuk permohonan di bawah sub-perenggan (a). Dalam kes ini permohonan pembatalan responden adalah berdasarkan A 18 k 19(1)(a) hingga (d) dan hakim Mahkamah Tinggi memutuskan bahawa beliau hanya akan mempertimbangkan permohonan di bawah A 18 k 19(1)(b) dan (d) memandangkan kedua-dua pihak telah memfailkan affidavit-afidavit masing-masing. Walau bagaimanapun, apa yang seharusnya dilakukan oleh hakim perbicaraan adalah untuk mengendali sub-perenggan (a) terlebih dahulu dan mengendahkan sepenuhnya kedua-dua affidavit yang difailkan oleh pihak-pihak sebelum mempertimbangkan affidavit keterangan dan mengendalikan sub-perenggan (b) dan (d) (lihat perenggan 9–10).
- (2) Kuasa untuk membatalkan suatu kes di bawah A 18 k 19(1)(a) adalah kuasa yang seharusnya jarang sekali dilaksanakan dan hanya dalam kes-kes luar biasa. Hakim perbicaraan hendaklah berpuas hati bahawa pernyataan tuntutan adalah tidak mencukupi meskipun ia dapat memberi hak kepada perayu-perayu kepada relief yang dipohon dan menyimpulkan bahawa kausa tindakan dengan jelas tidak boleh pertahankan. Dalam kes ini, pernyataan tuntutan yang difailkan oleh perayu-perayu terhadap responden dengan jelas mengemukakan sedikit kausa tindakan mengikut undang-undang kontrak atau telah membangkitkan beberapa persoalan yang harus diputuskan. Dalam keadaan-keadaan ini adalah tidak bersesuaian bagi tuntutan ini untuk dibatalkan di bawah A 18 k 19(1)(a) (lihat perenggan 12–13).

- (3) Kedua-dua sub-perenggan (b) dan (d) adalah berdasarkan prinsip yang sama, iaitu pembatalan adalah tidak bersesuaian apabila terdapat percanggahan keterangan di dalam affidavit-afidavit. Dalam kes ini, dengan jelas terdapat percanggahan keterangan di dalam affidavit-afidavit yang difailkan oleh kedua-dua pihak dan status transaksi yang mana membawa kepada milikan kedua-dua hartanah yang dipindahmilik kepada responden adalah dengan benar dan tulen dalam pertikaian. Dalam keadaan-keadaan ini tuntutan perayu-perayu terhadap responden tidak bersifat skandal, remeh atau menyusahkan dan bukanlah penyalahgunaan proses mahkamah. Justeru adalah diperintahkan bahawa kes diremit kepada Mahkamah Tinggi untuk perbicaraan (lihat perenggan 21, 27–28).]

Notes

For cases on application to strike out action, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.

Cases referred to

- Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417, CA (folld)
- Attorney General of The Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274, CA (refd)
- Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, SC (refd)
- Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807, HC (refd)
- CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, FC (refd)
- Castro v Murray* (1875) LR 10 Exch 213 (refd)
- Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, PC (refd)
- Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11, CA (refd)
- Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504, HC (refd)
- Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Bhd* [2001] MLJU 328; [2001] 2 AMR 1307, HC (refd)
- Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, FC (refd)
- Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32 (refd)
- Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38; [2000] 2 CLJ 601, HC (refd)
- Murray v Epsom Local Board* [1897] 1 Ch 35, Ch D (refd)
- New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, FC (refd)
- Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129, CA (refd)

- A *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, PC (refd)
Vernazza, Re [1959] 2 All ER 200, QBD (refd)

Legislation referred to

- B Rules of the High Court 1980 O 18 r 19, O 18 r 19(1), 19(1)(a), (b), (c), (d),
(2)

Appeal from: Suit No MT3–22–222 of 2006 (High Court, Shah Alam)

- C *T Gunaseelan (Gunaseelan & Associates) for the appellants.*
Hoo Lin Coln (Lin Coln & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

- D [1] Both the appellants ('the plaintiffs at the court below') are husband and wife, and claimed to be the legal owners of two properties at No 1 & 3, Jalan SJ7, Jalan Selayang Jaya 68100 Batu Caves, Selangor.

- E [2] In their statement of claim, the appellants pleaded the following facts:

- F (a) that sometime on 16 June 2003 and 30 July 2003, both the appellants had borrowed money in the sum of RM500,000 from the respondent ('the defendant at the court below'); and as security for the said loan, the appellants were asked to sign two sets of undated sale and purchase agreements in respect of the two properties which say that the purchase price of the properties were RM300,000 and RM200,000 each respectively;
- G (b) that the respondent had only paid RM400,000 to the appellants for the said loan, saying that RM100,000 was to be deducted up front as interest. The appellants claimed to have repaid RM300,000 for the said loan. When they failed to repay the balance of the said loan, the respondent forced them to pay RM800,000 to the respondent if the appellants want the two properties to be transferred back to them;
- H (c) that the sale and purchase agreements were void and invalid on the ground that they were made as security for loan transaction;
- I (d) that the respondent has no licence to lend money, at the material time; and
- (e) that the appellants were willing to pay RM100,000 to the respondent in order to get back the titles for both the properties, if the court orders so.

- [3] The appellants filed a writ and statement of claim dated 7 March 2006 against the respondent for a declaration that the said two sale and purchase

agreements are void and invalid and thus cancelled; and the appellants are to pay the respondent a sum of RM100,000 for the return of the ownership of the two properties to the appellants.

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[4] The respondent entered appearance on 25 May 2006 and later on 23 June 2006 filed his statement of defence. The respondent then on 31 May 2011 filed his summons in chambers for an order that the writ and statement of claim dated 7 March 2006 filed by the appellants against the respondent be struck out under O 18 r 19(1)(a)–(b) and (d) of the Rules of the High Court 1980 ('RHC'). The High Court had on 9 January 2012 allowed the respondent's said application, whereby the appellants claim against the respondent was struck out with costs of RM2,000.

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[5] The grounds for the said application by the respondent were:

- (a) the appellants, at their own request, had sold the two properties to the respondent; and to that effect, the appellants and the respondent had signed two sets of sale and purchase agreement on 16 June 2003 (for the first property) and on 30 July 2003 (for the second property);
- (b) the respondent was subsequently registered as the owner of the first property on 10 February 2004 and of the second property on 18 March 2004;
- (c) that the respondent had legally obtained indefeasible titles to both the properties in question;
- (d) that the appellants had not disputed their signatures in the sale and purchase agreements as well as in Form 14A and Form PDS15; and
- (e) the appellants' claim did not disclose any cause of action and therefore was an abuse of the process of the court.

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[6] The learned High Court judge, in allowing the respondent's application, was of the view that since both parties have filed their respective affidavits for the application, she would then proceed to hear the application under r 19(1)(b) and (d). At p 2 (para 2) of her grounds of judgment, the learned judge said:

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Namun begitu, bagi maksud pelupusan saman dalam kamar ini, saya akan mempertimbangkan permohonan di bawah perenggan (b) dan (d) kerana kedua-dua pihak telah membuat pergantungan kepada keterangan affidavit dalam mengenengahkan kes masing-masing.

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OUR FINDINGS

[7] Under para (a) of the respondent's summons in chambers dated 31 May

A 2011 for the striking out application, the respondent rested his application pursuant to O 18 r 19(1)(a)–(b) and (d) of the RHC and inherent power of the court. For the purpose of the present appeal, we shall deal with all the three limbs of the said r 19(1).

B [8] For convenience, the full text of r 19(1), (2) is reproduced below:

19 Striking out pleadings and indorsements (O 18 r 19)

- C (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- D (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- E (2) No evidence shall be admissible on an application under paragraph (1) (a).

[9] An applicant for striking out under O 18 r 19 can rely on any one or more than one sub-para (a)–(d). So far, there is no authority to say otherwise. *Halsbury's Laws of Malaysia* clearly confirms that an applicant under this rule is entitled to rely on any or all of the grounds specified in the rule. An application under this rule is not void and ineffective merely because sub-para (a) had been pleaded together with sub-para (b)–(d). The only limitation imposed under sub-r (2) is that for an application under sub-para (a), no evidence is admissible. However, where the court proceeds to decide an application under any other sub-paragraph, affidavit evidence should be admissible. Even though sub-para (b)–(d) are to be read disjunctively, it does not mean that an applicant cannot rely on more one sub-paragraph in his application, (see *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38; [2000] 2 CLJ 601; *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 and *Malaysian Court Practice* 2007 Desk Edition (High Court) p 239).

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[10] In the present case since the application by the respondent is also based on sub-para (1)(a), the learned judge should have dealt with the said sub-para notwithstanding the fact that both parties had filed their respective affidavits. Those affidavits are actually to be used for the other two sub-para (b) and (d). What the learned judge should have done is to deal with the issue under sub-para (a) first and to ignore completely the two affidavits filed by the parties; before proceeding to deal with sub-para (b) and (d).

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[11] The learned judge must bear in mind that striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226).

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[12] We have scrutinised the statement of claim filed by the appellants against the respondent in the present case. We are of the view that the statement of claim assuming the factual allegations are true or proven and without looking at the affidavit evidence, clearly discloses some cause of action under the law of contract or has raised some questions fit to be decided. The statement of claim is not hopeless, baseless or without any foundation in law. The statement of claim may not be perfect and 'not-so strong' in supporting the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (Supreme Court); *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105).

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[13] We are therefore of the view that the appellants' statement of claim in the present case is not appropriate to be struck out under sub-para (1)(a) of r 19.

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[14] The learned judge had indicated in her grounds of judgment that for the purpose of the striking out application, she would only consider the application under sub-paras (b) and (d) of r 19, based on the affidavits filed by the parties. However after reading the whole of the grounds of judgment, we are unable to point out under which sub-para the application was allowed.

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[15] Sub-paragraph(1)(b) deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) deals with 'an abuse of the process of the court'. In *Murray v Epsom Local Board* [1897] 1 Ch 35 it was held by the court that, 'scandalous' generally refers to matters which improperly cause a derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive language (see also *Boey Oi Leng (Trading as Indah Reka Construction and Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807; and *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11).

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- A The words 'frivolous or vexatious' generally refer to a groundless action of statement with no prospect of success, often raised to embarrass or annoy the other party to the action. In considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of the matter and it is not to be determined by whether the pleading discloses
- B a cause of action or not (see *Attorney General of The Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274; and *Re Vernazza* [1959] 2 All ER 200). It was decided in the above case of *Attorney General of The Duchy of Lancaster* that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable'.
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[16] Raja Azlan Shah J (as HRH then was) had made the following observation in the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32:

- D No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no
- E legitimate amendment can save it from being demurrable: per Chitty J, in *Republic of Peru v Peruvian Guano Co.*

- [17] For sub-para (1)(b) the learned judge was entitled to look at the affidavit evidence adduced by the parties. She must appreciate that it is not appropriate
- F in striking out proceedings to resolve conflict of evidence (as in the present case) on affidavits; the proper time for doing so is at discovery or by cross-examination of witnesses or deponents. Contested matter, where facts are in dispute, could not be resolved by affidavit evidence. In order to invoke the provisions, the underlying fact must not be in dispute and the matter is purely
- G a question of interpretation of fact and the law.

- [18] Sub-para (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In *Castro v Murray* (1875) LR 10 Exch 213, the phrase
- H 'abuse of the process of the court' had been described generally to refer to situations where the court's process is used for an unlawful object and not for the actual purpose intended to achieve justice. It involves a process which is contrary to good order established by usage. In dealing with this sub-para (1)(d), again the judge is entitled to look at the affidavit evidence, on the same
- I principle applicable to sub-para (1)(b) ie striking out is not appropriate when there is conflicting evidence in the affidavits. The judge must determine and decide the issue in question by consideration of the undisputed facts.

[19] The rule on dealing with affidavit evidence had been clarified by Lord

Templeman of the Privy Council in the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, where it was said:

At the end of the day, the judge must decide the petition on the evidence before him. if allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavit, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must decide the fate of the petition by consideration of the undisputed facts.

[20] In another Privy Council case — *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, it was held that since there was a conflict of evidence on affidavit that could not be resolved by rejecting the evidence of one side, then the matter of conflict had to be determined by examining the deponent of the affidavit in order to determine the truth of the relevant issues.

[21] In the present case before us, there is clearly conflict of evidence in the affidavits filed by both parties. The status of the transaction which led to the ownership of the two properties being transferred to the respondent's name is really and genuinely in dispute. The appellants are saying that they had no intention to sell the properties to the respondent, and the transaction involved between them and the respondent was a loan transaction where the properties were meant to be security for the loan; and once the loan had been repaid or when the appellants are ready and willing to repay the loan in full, they are entitled for the return of the titles of the two properties. The respondent on the other hand contended in his affidavit in support of the application for striking out, that there was an outright sale of the two properties by the appellants to the respondent, where price had been paid to the appellants and the titles were duly transferred to him. The respondent claimed to be a bona fide purchaser for the two properties.

[22] To conclude on this issue, we shall now reproduce the passage from the decision of the Court of Appeal in *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417 which in our view is very relevant and applicable to the facts of the present case before us:

- (2) In considering whether Carah's statement of claim was scandalous, frivolous or vexatious under O 18 r 19(1)(b), or was an abuse of the process of the court under O 18 r 19(1)(c), the court is entitled to look at the affidavit evidence and the exhibits. Looking at the pleadings and the affidavit and the various exhibits filed by Carah and the lenders, there was a serious conflict of material affidavit evidence which could only be resolved by subjecting the deponents to cross-examinations and/or calling other witnesses whose evidence could only be evaluated by the court after seeing and hearing them.
- (3) The court should not examine the evidence in such a way as to amount to

- A conduct a trial on the conflicting material affidavit evidence. In the present appeal, the pleadings run to dozens of pages, the opposing affidavits and the exhibits for both sides run to hundreds of pages. In the circumstances of this case, the court did not consider that this was a proper case to embark on a minute and protracted examination of the entire evidence in the appeal record which is already bulky.
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- (4) As the court had already found that Carah's statement of claim did disclose a reasonable cause of action and that there was a triable issue, the inevitable conclusion would be that Carah's statement of claim in all the circumstances of the case could not be said to be scandalous, frivolous or vexatious or an abuse of the process of the court. The court was unable to say that the claim was not bona fide or that the claim was bound to fail from the beginning. This was therefore not a proper case for the court to exercise its summary power under O 18 r 19 of the RHC.
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CONCLUSION

- [23] Judges dealing with striking out application under O 18 r 19 of the RHC must always bear in mind that the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution' — Per Seah FJ. It is a power which ought to be very sparingly exercised and only in very exceptional cases, (per Lord Herschell in *Lawrence v Norrey* — as cited in *CC Ng & Brothers*).
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- [24] Some judges described the power to strike out the plaintiff's claim as 'draconian' — in the sense that the plaintiff is being deprived completely from having his day in the court of law to establish his claim by adducing evidence and calling of witnesses. If not properly exercised, the court in effect as closing its door for the plaintiff to have his recourse to justice. If the application by the defendant is dismissed, the case will still go for trial and the defendant will still has his second bite of the cherry during trial. On the other hand, if the application is allowed and the case is struck out (as in the present case before us) the plaintiff will obviously loss everything, particularly when the plaintiff cannot refile the claim because of limitation issue.
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[25] The power under O 18 r 19(1) of the RHC is not only confined to the power to strike out pleading or claim. It also empowers the court to amend any

pleadings, in appropriate case. To facilitate that, the court may order the action to be stayed, so as to give time to the plaintiff to effect the necessary amendment to the pleadings or the statement of claim. Where the pleadings are defective and the opposing party seeks to strike out those pleadings, the court ought not to act summarily if an amendment can correct the defect (see *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504; and *Lim Weow @ Lim Neu v Perwira Habib Bank Malaysia Bhd* [2001] MLJU 328; [2001] 2 AMR 1307).

[26] Striking out applications under O 18 r 19(1) of the RHC should not be taken lightly by judges. No doubt, the application is recorded as an 'interlocutory matter' in the court dockets, but the effect of the striking out is far more serious and drastic compared to the decision after full trial. In full trial cases, the plaintiff is given full chance and opportunity to establish and prove his claim before the court of law. However, in striking out proceedings, his claim is struck out even before he has the chance and opportunity to prove his case.

[27] Based on the above considerations we are satisfied that the learned judge in the present case had erred in striking out the appellants' claim against the respondent under O 18 r 19 of the RHC. We are of the considered view that the appellants' claim against the respondent as laid down in the statement of claim is not obviously unsustainable. It discloses a reasonable cause of action; it is not scandalous, frivolous or vexatious; and also not an abuse of the process of the court.

[28] We therefore allow the appeal and make an order that the case be remitted to the High Court for trial. We also make an order that the costs be in the cause and the deposit be refunded to the appellants.

Appeal allowed.

Reported by Kohila Nesan

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